



**Mabati Rolling Mills Limited v Green Hardwares Limited & another (Commercial Case E441 of 2019) [2024] KEHC 13090 (KLR) (Commercial and Tax) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13090 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E441 OF 2019  
MN MWANGI, J  
OCTOBER 14, 2024**

**BETWEEN**

**MABATI ROLLING MILLS LIMITED ..... PLAINTIFF**

**AND**

**GREEN HARDWARES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**GAFEN JACKTON ONYANGO OCHIENG ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me is a Notice of Motion application dated 12<sup>th</sup> March 2024 filed by the defendants pursuant to the provisions of Sections 1A, 3A & 15 of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all enabling provisions of the law, seeking orders that this suit be transferred to the High Court in Bungoma for hearing and determination.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Gafen Jackton Onyango Ochieng, the 2<sup>nd</sup> defendant herein and the 1<sup>st</sup> defendant's Director. He averred that the plaintiff has been supplying products to the 1<sup>st</sup> defendant for over 30 years, under a contract which was executed between them and performed exclusively in Bungoma. He further averred that the 1<sup>st</sup> defendant's principal place of business is in Bungoma with no branches elsewhere, and all sales by the 1<sup>st</sup> defendant are conducted from its Bungoma premises. Additionally, that all product deliveries by the plaintiff were made to Bungoma town.
3. Mr. Ochieng asserted that he has been inconvenienced by having to travel to Nairobi for mediation sessions, as he manages the 1<sup>st</sup> defendant's business daily. He stated that this suit should have been filed in Bungoma where the cause of action arose, and where the defendants are based. He further stated that the application herein has been filed in good faith, and that the delay in doing so, was due to ongoing out-of-court negotiations and mediation. The 1<sup>st</sup> defendant stated that this case involves substantial



- documentation to be relied on, hence if the orders sought are not granted, the defendants' ability to properly prepare for the hearing will be significantly impacted.
4. In opposition to the application, the plaintiff filed grounds of opposition dated 8<sup>th</sup> April 2024, raising the following grounds –
    - i. The suit arises out of contract. The cause of action herein arose in Nairobi and this Court has jurisdiction in terms of Explanation (3)(i), (ii) and (iii) under Section 15(c) of the [Civil Procedure Act](#);
    - ii. In any event, no good grounds have been set out to warrant a grant of the orders sought and the application is otherwise an abuse of the process of this court as -
    - iii. The defendants have already admitted the jurisdiction of the Court under paragraph 18 of the defence dated 14<sup>th</sup> January 2020 filed in Court on 14<sup>th</sup> January 2020 and paragraph 17 of their Amended Defence & Counterclaim dated 10<sup>th</sup> February 2020 and filed in Court on 13<sup>th</sup> February, 2020; and
    - iv. The defendant is guilty of laches - suit has been pending in Court since 2017 and the disputation on jurisdiction should have been made at the earliest possible time.
  5. The application herein was canvassed by way of written submissions. The defendants' submissions were filed on 17<sup>th</sup> April 2024 by the law firm of A.H. Malik & Company Advocates, while the plaintiff's submissions were filed by the law firm of Waruhiu K'owade & Ng'ang'a Advocates on 29<sup>th</sup> April 2024.
  6. Mr. Orina, learned Counsel for the defendants submitted that the cause of action arose in Bungoma, as the contract between the plaintiff and the 1<sup>st</sup> defendant was executed and performed there. He emphasized that the defendants reside and conduct business in Bungoma. He noted that the plaintiff has not provided proof to support the claim that the cause of action arose in Nairobi. Mr. Orina cited the provisions of Section 15 of the [Civil Procedure Act](#), when clarifying that the defendants are not challenging the Court's jurisdiction but are questioning the appropriate place for filing the lawsuit. He argued that this suit was filed in December 2019 before the said Covid-19 Pandemic, but its progression was faced with delays due to the pandemic, and significant progress was only made afterward with efforts such as the court-annexed mediation.
  7. He emphasized that any delays were unintentional and should not affect the defendants' right to have the case heard in the proper forum, which he asserts is the High Court in Bungoma. Counsel stated that the defendants have made out a case for being granted the orders sought. To buttress these submissions, he relied on the Court of Appeal case of [John Gakure & 148 others v Dawa Pharmaceutical Co. Ltd & 7 others Civil Application No. 299 of 2007](#) cited by the Court in [Justus Munyinyi Macharia t/a Gusii Proprietary Club v Dakiang'a Distributors Limited \[2015\] eKLR](#).
  8. Mr. Thiga, learned Counsel for the plaintiff cited the provisions of Section 15(c) of the [Civil Procedure Act](#) and relied on the case of [Mohamed Abu Ali v Kenya Power & Lighting Co. Ltd \[2000\] eKLR](#). He submitted that it is clear from the cash deposit slips annexed to the defendants' supplementary bundle of documents that payments were being made to the plaintiff's Standard Chartered Bank account at Nairobi Kenyatta Avenue Branch, therefore, this suit has been filed in the proper Court in Nairobi. He cited the provisions of Section 17 of the [Civil Procedure Act](#) and Nairobi Court of Appeal Civil Application No. 16 of 2012 referred to by the Court in [Joshua Ngatu v Jane Mpinda & 3 others \[2019\] eKLR](#). He further submitted that noting that this suit was filed in the year 2019, there has been inordinate delay in filing the instant application, thus the defendants are guilty of laches. He relied



on the case of Bud & Blooms Ltd v Jonathan Balongo Okumu [2021] eKLR, and asserted that the defendants have not demonstrated sufficient reasons to warrant being granted of the orders sought.

### **Analysis And Determination.**

9. I have considered the application filed herein, and the affidavit filed in support thereof. I have also considered the defendants' grounds of opposition and the written submissions by Counsel for the parties. The issue that arises for determination is whether the suit herein should be transferred to Bungoma High Court.
10. From the outset, it is important to note that the defendants do not dispute that this Court has the requisite jurisdiction to hear and determine this suit, they however cited the provisions of Section 15 of the Civil Procedure Act and urged that the suit between the parties herein should be transferred to Bungoma where the defendants not only reside and conduct their business, but also where the cause of action arose, since the contract between the plaintiff and the 1<sup>st</sup> defendant was executed and performed there. They further averred that this case involves substantial documentation to be relied on, hence if the orders sought are not granted, the defendants' ability to properly prepare for the hearing will be significantly impacted.

11. Section 15 of the Civil Procedure Act provides that a suit ought to be instituted where the defendant resides or where the cause of action arises. It states that –

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction -

- a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
  - b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
  - c. the cause of action, wholly or in part, arises.
12. From the above provisions, I opine that a suit can be instituted either where the defendants reside and/or carry on their business, or where the cause of action arose. In this case, the defendants averred that they both reside and carry on their business in Bungoma, and the cause of action herein arose in Bungoma since the contract between the plaintiff and the 1<sup>st</sup> defendant was executed and performed there. Section 15 Explanation (iii) of the Civil Procedure Act provides that –

In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely -

- i. the place where the contract was made;
- ii. the place where the contract was to be performed or the performance thereof completed;
- iii. the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.



13. Upon perusal of the annexures attached to the defendants' affidavit in support of the application herein, it is manifest that annexure No. GF001 is an application for a credit account by the 1<sup>st</sup> defendant to the plaintiff, and not a contract between the plaintiff and the 1<sup>st</sup> defendant as it is not at the very least executed by the two parties indicating their intention to be bound by the terms (if any) therein. Further, the defendants have also not produced to this Court a copy of the contract between the plaintiff and the 1<sup>st</sup> defendant. It is however noteworthy that the said annexure show that the defendants indeed reside and carry on their business in Bungoma.
14. As to whether the contract between the plaintiff and the 1<sup>st</sup> defendant was performed in Bungoma, the plaintiff submitted that from the cash deposit slips attached to the defendants' supplementary bundle of documents, payments by the defendants to the plaintiff were being made to the plaintiff's bank account at Standard Chartered Bank, Nairobi Kenyatta Avenue Branch. After perusal of the said documents, I however note that the said cash deposit slips indicate that the defendants were making payments to the plaintiff's bank account at Barclays bank Bungoma Branch and Standard Chartered Bank Bungoma Branch as is evident from the Tellers' stamps affixed on the face of the slips. In the premise, I agree with the defendants that the contract between the parties herein was not only performed and/or the performance thereof was completed in Bungoma but the plaintiff's payment was being made in Bungoma. In the absence of any other evidence to the contrary, I am persuaded that the cause of action in this suit arose in Bungoma and not Nairobi as alleged by the plaintiff.
15. Pursuant to the provisions of Article 165(3)(a) of *the Constitution* of Kenya, 2010, this Court has unlimited original jurisdiction in both criminal and civil matters. Therefore, in order for this Court to exercise its discretion in favour of the defendants and grant the orders being sought herein, the defendants have to demonstrate sufficient reason why this suit should be transferred, because relying on Section 15 of the *Civil Procedure Act* on its own is not sufficient. In the case of *Kaigi General Contractors Ltd v National Irrigation Authority (Civil Suit E009 of 2021)* [2023] KEHC 3396 (KLR) (27 April 2023) the Court held as follows -

Bearing in mind that the High court has unlimited jurisdiction under Article 165 of *the Constitution*. I am of the considered view that such jurisdiction cannot be limited by Section 15 of the *Civil Procedure Act* especially given the peculiar circumstances of this case. It was held in the case of *Selina Vukinu Ambe Vs Ketan Shashikant Khatri* [2020] eKLR –

‘With reference to the matters at hand, this means that the High Court is constitutionally mandated to hear and determine all civil disputes irrespective of their nature or the value of the subject matter. The High Court jurisdiction being a creature of *the Constitution* which is the supreme law of the land cannot be limited or fettered by any other written law including the *Civil Procedure Act*. In my view, any statute that would purport to limit the High Court's jurisdiction as conferred by Article 165(3) would to that extent be unconstitutional by virtue of Article 2(4) of *the Constitution*.’

16. In this instance, the defendant's application is heavily anchored on the contention that it would suffer extreme prejudice in terms of costs, convenience, and proper preparation of the hearing of the suit if the matter is heard in Nairobi due to the enormous documentation to be relied on by the plaintiff, if the orders sought are not granted as the 2<sup>nd</sup> defendant will be compelled to attend hearings of the suit in Nairobi where he neither resides nor conducts his business,
17. Other than allege that the defendants shall suffer prejudice in the event that this suit is not transferred, the defendants have not demonstrated how they shall be prejudiced as was held by the Court in the case of *Ivita v Kyumbu* [1975] eKLR. It is evident that this suit was filed in the year 2019 and since then, the defendants have neither orally nor formally sought for its transfer, until when they filed the



present application dated 12<sup>th</sup> March, 2024. Further, the defendants averred that between the year 2019 to date, the 2<sup>nd</sup> defendant has been travelling to Nairobi to attend out of Court negotiations and Court annexed mediation without any complaints. In addition, the voluminous documents that the defendants are alluding to, have been within their knowledge as the parties herein had complied with pre-trial directions, the case was certified ready for hearing and a hearing date was fixed, yet they never saw the need to seek for the transfer of this suit to the High Court sitting in Bungoma at the earliest opportunity.

18. Evidently, the application herein has been filed at the very last minute after the matter was certified ready for hearing and a hearing date set. In the premise, it is apparent that the defendants have not only filed the instant application inordinately late, but they have also not made out a case to warrant this Court to exercise its discretion in their favour. If any prejudice will be suffered by the defendants in the course of the proceedings in the main suit due to their travel to Nairobi from Bungoma and back, and other incidental costs, and if they emerge successful in the suit, they will be compensated with an award of costs.
19. In the end, this Court finds that the defendants' application dated 12<sup>th</sup> March 2024 is bereft of merits. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF OCTOBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Muthama h/b for Mr. Thiga for the plaintiff

No appearance for the defendants

Ms B. Wokabi – Court Assistant.

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